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Re: Supplemental Comments Regarding "Public Notice of EPA's Review of Maine Water Quality Standard Revisions as They Apply in Indian Territories"

The Houlton Band of Maliseet Indians respectfully submits these supplemental comments on the State of Maine's request for approval of revised water quality standards (WQSs) for arsenic, acrolein, and phenol. The Tribe requests that the EPA make these comments part of the record. Specifically, the Houlton Band writes to emphasize the federally-protected nature of its water and fishing rights on Maliseet trust lands and in Maliseet waters, and the EPA's trust responsibility to protect those uses.[1] These comments also address why the State's use of inconsistent fish consumption rates is arbitrary and capricious. The Houlton Band reiterates and incorporates its prior comments dated September 13, 2013, including all attachments thereto, and urges the EPA to disapprove Maine's inadequate WQSs.

I. The Houlton Band's Federally-Protected Water and Fishing Rights and the EPA's Trust Obligation to Protect those Uses under the Clean Water Act

As discussed in detail in our prior comments, the "Wolastoqewiyik" or Maliseet Indians are river people who have fished, hunted, trapped, and gathered natural resources in the "Wolastoq" or St. John watershed for thousands of years. These resources are central to our diet, culture, traditions, spirituality, and health and welfare. Congress recognized the Maliseet way of life in the Maine Indian Claims Settlement Act (MICSA). See, *e.g.*, S. Rep. No. 96-957 at 11 ("All three tribes are riverine in their land-ownership orientation. . . . The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River."). MICSA and the Maine Implementing Act accordingly provided a

[1] For purposes of these comments, "Maliseet waters" include those portions of the Meduxnekeag River and its tributaries that run through Houlton Band trust or fee lands, including Big Brook, Suitter Brook, Smith Brook, Dead Stream, and the small brook that enters Cochran Lake from Houlton Band fee property, as well as any other water bodies in or adjacent to these lands.

homeland for the Houlton Band by setting aside "land or natural resources" in trust for the Band. *See* 25 U.S.C. § 1724(d); 25 U.S.C. § 1724(d), Note, Public Law No. 99-566, § 4(a) (Oct. 27, 1986). Congress explained that these trust resources would substitute and were in exchange for the Band's aboriginal lands and natural resources. S. Rep. No. 96-957 at 24 (explaining that "[t]he land . . . is intended to constitute satisfaction of the Band's legal claims" and that Congress seeks "to settle all Indian land claims in Maine fairly"); *see also* 25 U.S.C. §§ 1721 (findings and purpose), 1723 (relinquishing lands and natural resources). The United States Department of the Interior confirmed on January 15, 1993 that Maliseet trust lands acquired under MICSA—located on both banks of the Meduxnekeag River, a tributary of the St. John—are an Indian reservation for purposes of federal law. *See* Attachment.

As a matter of federal law, the lands and natural resources held in trust by the United States for the benefit of the Houlton Band include water and fishing rights. Federal common law is clear that when Congress sets aside lands in trust for the use and benefit of an Indian tribe or individual Indians, as it did for the Houlton Band, Congress impliedly reserves water and fishing rights on those lands. *See, e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404, 405-06 (1968) (holding that lands acquired for a tribe in exchange for the relinquishment of other lands include implied hunting and fishing rights); *Arizona v. California*, 373 U.S. 546, 599 (1963) (finding implied water rights where "water from the River would be essential to the life of the Indian people and to the animals they hunted and the crops they raised"); *Winters v. United States*, 207 U.S. 564, 577 (1908) (holding that tribe impliedly reserved water rights to support beneficial use of its lands). This reservation of federal rights occurs regardless of whether the lands are set aside by treaty, executive order, or statute. *See, e.g., United States v. Dion*, 476 U.S. 734, 745 n.8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implied hunting rights as those creates by treaty."). For example, in *Alaska Pacific Fisheries Co. v. U S*, 248 U.S. 78, 86-88 (1918), the Supreme Court held that where Congress set aside lands for the landless Metlakahtla Indians, it impliedly reserved fishing rights in adjacent waters. The Indians were historically fishers and hunters, and the lands were chosen to provide them access to the fishing grounds. *Id.* at 88-89. Similarly, in *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981), the court held that Congress impliedly reserved water rights to support the tribal fishery on tribal trust lands where "[t]he Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them."

Through MICSA, Congress acquired lands in trust for the benefit of the Houlton Band to provide the landless Maliseet Indians a home where they could preserve their riverine culture and engage in traditional fishing, hunting, and gathering activities. *See* S. Rep. No. 96-957 at 11 ("All three tribes are riverine in their land-ownership orientation. . . . The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River."); *id.* at 24 ("The Houlton Band is impoverished, it is small in number, it has no trust fund to look to, and it is questionable whether the land to be acquired for it will be utilized in an income-producing fashion in the foreseeable future."). As the Department of the Interior expected, the Tribe's reservation is located in eastern Aroostook County on the Meduxnekeag River, adjacent to one of the river's best fishing holes. *See* H.R. Rep. No. 96-1353 (Report of the Department of the Interior, Aug. 25, 1980). Federal law is clear that in reserving these lands Congress concurrently reserved water and fishing rights for the Tribe.

The Houlton Band's federally-protected water and fishing rights include the right to water of sufficient quantity and quality to support tribal fishing activities and other uses. *See United States v. Adair*, 723 F.2d 1394, 1408-11 (9th Cir. 1983). The leading federal Indian law treatise explains:

> To meet federal purposes, Indian reserved water rights should be protected against . . . impairments of water quality, as well as against diminutions in quantity. . . . Fulfilling the purposes of Indian reservations depends on the tribes receiving water of adequate quality as well as sufficient quantity. . . . The quality of the water necessary for [tribal] uses may vary from the high quality needed for human consumption to a lesser quality for fish and wildlife habitat to an even lower quality for irrigation. Each use, however, requires water that is appropriate quality to support that use.
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> The quality and quantity of water may be directly related. This interrelationship is most evident in the case of a reserved right to water for fisheries preservation. The right reserved is that amount of water necessary to maintain the fishery. The fishery consists not only of the fish themselves, but also of the conditions necessary to their survival. Thus, habitat protection is an integral component of the reserved right. In order to protect the fishery habitat, tribes should have a right not only to a sufficient amount of water, but also to water that is of adequate quality.

Cohen's Handbook of Federal Indian Law § 19.03[9], at 1236 (Nell Jessup Newton ed., 2012) (footnotes and citations omitted).

The EPA therefore has a trust obligation to protect the quality of Maliseet waters, which are the lifeblood of the Maliseet people and which support the fish, animals, and plants at the core of their diet and culture. *See, e.g., Parravano v. Babbitt*, 70 F.3d 539, 546-47 (9th Cir. 1995) (recognizing the United States' trust obligation to protect impliedly reserved fishing rights); *see also generally State Program Requirements: Approval of Application by Maine to Administer the National Pollutant Discharge Elimination System (NPDES) Program*, 68 Fed. Reg. 65,052, 65,056 (Nov. 18, 2003) ("Clearly, the physical setting of the . . . tribes in such close proximity to important rivers makes surface water quality important to them and their riverine culture."). As the Solicitor concluded in regard to Maine's initial application for NPDES authority in Indian country:

> EPA must, in accordance with the best interest of the Tribes and the "most exacting fiduciary standards," faithfully exercise its federal authority and discretion to protect Maliseet . . . tribal water quality from degradation. EPA would take into consideration more than just the minimum requirements in the CWA in overseeing a State program to fully protect Tribal resources, including lands and waters. Specifically, EPA would have to consider the specific uses the Maliseets . . . make of their tribal waters, including traditional, ceremonial, medicinal and cultural uses affected by water quality. EPA must be fully satisfied that it is able to meet its trust obligation to the Maliseets . . . even if it approves the State of Maine to administer the NPDES program. EPA should seek assurances from the State of Maine that the state will implement the NPDES program in a manner which satisfies EPA's trust obligations.

Solicitor's Opinion attached to Letter from Edward B. Cohen, Office of the Solicitor, Dep't of Interior to Gary S. Guzy, Office of General Counsel, Envtl. Protection Agency, at 2 (May 16, 2000) (citations omitted). These conclusions apply with equal weight to Maine's request to apply its revised WQSs in Maliseet waters.

The Houlton Band notes that MICSA and the Maine Implementing Act do not speak to their water and fishing rights in precisely the same manner as the legislation speaks to the rights of the Passamaquoddy Tribe and the Penobscot Nation. However, nothing in that distinction or elsewhere in MICSA demonstrates, or even suggests, the absence of federally-protected water and fishing rights for the Maliseets. First, as discussed above, it is well-established that when the United States sets aside lands in trust for an Indian tribe, it impliedly reserves water and fishing rights, regardless of whether the treaty, statute, or executive order expressly refers to such rights. *See*, *e.g.*, *United States v. Aanerud*, 893 F.2d 956, 958 (8th Cir. 1990) (holding that tribal members have federally-protected right to harvest natural resources on tribal lands notwithstanding silence in treaty setting aside lands for tribe). Second, MICSA and the Maine Implementing Act contemplate these rights, defining the "lands or natural resources" held in trust for the Houlton Band to include "any interest in or right involving any real property or natural resources, including . . . water and water rights, and hunting and fishing rights." 25 U.S.C. § 1722(b); Me. Rev. Stat. tit. 30, § 6203(3). Third, the relevant provisions in the Maine Implementing Act regarding the Passamaquoddy Tribe and the Penobscot Nation are directed at *the State's regulatory authority* over the tribes' exercise of fishing rights on their reservations, not the existence of those rights altogether. *See* Me. Rev. Stat. tit. 30, § 6207(1), (4); S. Rep. No. 96-957 at 16-17, 37; *see also* Me. Rev. Stat. tit. 30, § 6206(1). Fourth, Congress confirmed in MICSA that Maliseet trust lands would be treated in the same manner as any other Indian reservation, *see* 25 U.S.C. § 1725(i), and the Department of the Interior has confirmed that Maliseet trust lands are an Indian reservation for purposes of federal law.[2]

Accordingly, regardless of whether the State may have some regulatory authority over the Houlton Band's exercise of reserved fishing rights in Maliseet waters, 25 U.S.C. § 1725(a), Me. Rev. Stat. tit. 30, § 6204, those rights exist as a matter of federal law. Moreover, recognizing the Houlton Band's reserved water and fishing rights, and the EPA's trust obligation to protect the Tribe's uses of Maliseet waters, does not operate to preempt the civil, criminal, or regulatory jurisdiction of the state of Maine under MICSA. *See* 25 U.S.C. § 1725(h).

To the extent the EPA sees any ambiguity in MICSA or in the foregoing discussion of the Tribe's federally-protected water and fishing rights, that ambiguity must be resolved in the Band's favor. Federal statutes relating to Indian tribes must be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), and Congressional acts diminishing sovereign tribal rights must be strictly construed, with

[2] Indeed, MICSA expressly provides that the same principles of federal law apply to the Houlton Band as apply to other federally-recognized Indian tribes. *See* 25 U.S.C. § 1725(h); *see also* 25 C.F.R. § 83.12(a) (providing that upon federal recognition, a tribe "shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States").

ambiguous provisions interpreted to their benefit, *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999). It is settled law that these Indian canons apply to Indian claim settlement acts, including MICSA. *Id.* at 708-09; *see also, e.g., Parravano v. Babbitt*, 70 F.3d at 546; *Connecticut ex rel. Blumenthal v. U.S. Dept. of the Interior*, 228 F.3d 82, 92 (2d Cir. 2000).

In sum, when the Houlton Band and its members use Maliseet waters, including sustenance fishing in the Meduxnekeag River, they exercise rights created and protected by federal law. These rights define and lie at the heart of the EPA's trust responsibility with respect to the authority to set WQSs in Maliseet waters and with respect to the substance of those water quality standards. The EPA has a trust obligation to ensure the protection of Maliseet uses through its review of the State's revised WQSs for arsenic, acrolein, and phenol, and should disapprove those standards.

II. Maine's Use of Different Fish Consumption Rates for Different Toxic Pollutants Is Arbitrary and Capricious

It is inherently arbitrary and capricious for the state of Maine to vary the fish consumption rate in developing criteria for different toxic pollutants for the same waters, yet that is exactly what Maine did. The Maliseet diet is centered on the natural resources of the Meduxnekeag watershed, but eating large amounts of fish from the river now exposes Maliseet families to the health risks associated with high levels of environmental contaminants in those waters. Recognizing that there were subsistence fishers who relied on fish from local waters, Maine used a fish consumption rate of 138 g/day when calculating the criteria for arsenic to force water quality protective of that sensitive subpopulation.[3] Yet, *for those same waters*, the state used a rate of only 32.4 g/day (the general population fish consumption rate) in developing the criteria for phenol and acrolein. Having already acknowledged that sensitive subpopulations in the state rely on local waters for their sustenance, Maine must rely on the same subsistence-based fish consumption rate in developing the criteria for all toxic pollutants for which humans are exposed through ingestion of fish.[4] To do otherwise puts subsistence fishers in the

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[3] As indicated in our prior comments, the Houlton Band of Maliseet Indians asserts that even the 138 g/day fish consumption rate is lower than warranted by EPA's default subsistence fish consumption rate of 142.5 g/day, existing local data, and the fact that fish consumption rates have been suppressed in recent decades. *See, e.g.*, Nat'l Envtl. Justice Advisory Council, *Fish Consumption and Environmental Justice* 43-49 (2002), *available at* http://www.epa.gov/compliance/ej/resources/publications/nejac/fish-consump-report_1102.pdf (discussing importance of accounting for suppressed consumption in developing fish consumption rates); Envtl. Protection Agency, *Guidance for Conducting Fish & Wildlife Consumption Surveys* 2-7 (1998), *available at* http://water.epa.gov/scitech/swguidance/fishshellfish/techguidance/upload/1999_11_05_fish_fishguid.pdf (advising that suppressed consumption due to fish advisories in local waters be accounted for); State of Maine, Application for Arsenic Water Quality Standard Revision, Exhibit 8, page 100, 106-07 (Jan. 14, 2013) (admitting fish consumption has been suppressed in tribal waters due to contamination concerns and acknowledging that fish advisories were in place at time of ChemRisk survey) [hereinafter "Maine Arsenic Application"]. The Tribe refers the EPA to those comments, as well as incorporates by reference those aspects of the Penobscot Nation's supplemental comments dated November 25, 2013, insofar as they relate to the inadequacy of the rate Maine adopted for these criteria and for subsistence fishers in general.

[4] *See, e.g.*, 40 C.F.R. § 131.11(a)(2) (criteria for toxics must protect designated uses, including fishable waters); Envtl. Protection Agency, *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* 1-11 to 1-12 (2000), *available at* http://water.epa.gov/scitech/swguidance/standards/upload/2005_05_06_criteria_humanhealth_method_comple

unenviable position of knowing that the fish on their dinner plate grew up in rivers or lakes clean enough to protect their fish-based diet as far as one toxic pollutant is concerned, but not the others. But a fisherman relying on locally caught fish for his daily sustenance should feel secure *both* that he will not suffer arsenic poisoning from eating that fish *and* that he will not suffer other adverse health effects (through chronic exposure to other dangerous toxins) from eating that same fish.[5]

So long as Maine has sensitive subpopulations such as the Houlton Band engaged in subsistence fisheries and so long as it promulgates water quality standard criteria for the toxins on a state-wide basis,[6] the State must apply the same subsistence fish consumption rate in its formulae for all human health-based criteria for toxics in order for those criteria to be scientifically defensible and to protect designated uses. When the Maliseet people consume fish, their consumption does not vary based on the particular toxins in the fish to which they are exposed. Therefore, the EPA should disapprove Maine's proposed criteria for acrolein and phenol.[7] Anything short of that would be arbitrary and capricious, as well as violate the agency's trust responsibility to the Tribe.[8]

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te.pdf ("[T]hrough the use of conservative assumptions with respect to both toxicity and exposure parameters, the resulting [criteria] should provide adequate protection not only for the general population over a lifetime of exposure, but also for special subpopulations who, because of high water- or fish-intake rates . . . have an increased risk of receiving a dose that would elicit adverse effects.").

[5] *See, e.g.*, Envtl. Protection Agency, *Human Health Ambient Water Quality Criteria and Fish Consumption Rates Frequently Asked Questions, available at* http://water.epa.gov/scitech/swguidance/standards/criteria/health/methodology/upload/hhfaqs.pdf ("EPA does not necessarily expect all consumers to eat only fish from a single State, but individuals or groups should be able to do so without concern for their health.").

[6] While using the general population fish consumption rate from water bodies *might* make sense if the State chose to promulgate its water quality standards on a site-specific, water body-by-water body basis, thereby allowing it to account for different levels of fishing use (and the potential absence of subsistence fishers) in certain water bodies, the State did not do so here. *See, e.g.*, Catherine A. O'Neill, *Protecting the Tribal Harvest: The Right to Catch and Consume Fish*, 22 J. ENVTL. L. & LITIG. 131, 140-42 (2007) (describing Oregon Technical Advisory Committee's recommendation that the Oregon Department of Environmental Quality (DEQ) "assign values to the various regulated water in Oregon depending on the intensity of fishing activity in those waters" and use a fish consumption rate of 17.5, 142.5, or 389 g/day, respectively, for low-, intermediate-, or high-intensity fishing activity on that water body); Oregon Dep't of Envtl. Quality, *Human Health Criteria Issue Paper: Toxics Rulemaking* 10 (2011), *available at* http://www.deq.state.or.us/wq/standards/docs/toxics/humanhealth/rulemaking/HumanHealthToxicCriteriaIssuePaper.pdf (explaining basis for choosing state-wide subsistence-based FCR as opposed to choosing FCR based on fishing use of individual water bodies, as well as basis for moving from original statewide FCR proposal of 17.5 g/day to 175 g/day); Oregon Dep't of Envtl. Quality, *Human Health Water Quality Standards for Toxic Pollutants and Implementation Policies Rulemaking (2008-2011), available at* http://www.deq.state.or.us/wq/standards/humanhealthrule.htm (describing 175 g/day statewide FCR). Instead, Maine sets its water quality standards on a state-wide basis. Maine Arsenic Application, Exhibit 6, page 1 (Jan. 14, 2013) (Ch. 584(1)). If Maine wishes to use a state-wide FCR instead of a site-specific FCR based on fishing use intensity of individual water bodies, then, like Oregon, it must employ a FCR protective of sensitive subpopulations throughout the state. Finally, if Maine chooses to use a water body-by-water body approach to the FCR, the burden should be on the state and the regulated community to demonstrate a lack of subsistence fishing on a water body, as opposed to placing the burden on the public to demonstrate the presence of subsistence fishing on that water body. Maine Arsenic Application, Exhibit 6, page 2-3 (Ch. 584(3)(B) requirements regarding developing more stringent criteria for individual water bodies); *id.* at Exhibit 8, page 9-10 (EPA's criticism of Ch. 584's placement of this burden on public instead of the state agency).

[7] *See, e.g., Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1275-77 (5th Cir. 1980) (recognizing EPA's strong oversight role over state promulgation of water quality standard criteria); *Amer. Forest & Paper Ass'n v. U.S. Envtl.*

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(Thank you)

Brenda Commander

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Tribal Chief

Protection Agency, No. 93-cv-0694, 1996 WL 509601, at *5, 7 (D.D.C. Sept. 4, 1996) (recognizing EPA's "broad discretion in its selection of data and in its method of calculation" of the fish consumption rate, including taking a conservative approach in criteria development).

[8] *See* Maine Arsenic Application, Exhibit 8, page 11 ("USEPA recommends that Maine DEP proposes statewide arsenic criteria that MEDEP can demonstrate are protective of the general population as well as the sensitive subpopulations in Maine, notably the Maine Indian Tribes' subsistence fishers. Such criteria should be derived from scientifically sound values for the different variables that comprise the calculation of the criteria including, but not limited to, a supportable FCR.").